

DMI Distribution of Delaware, Ohio, Inc. and Teamsters Local Union No. 284, a/w International Brotherhood of Teamsters, AFL-CIO. Cases 8-CA-29860, 8-CA-29864, 8-CA-29957, and 8-CA-30244

June 29, 2001

DECISION AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE
AND WALSH**

On April 16, 1999, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent and the General Counsel filed exceptions with briefs in support and answering briefs and thereafter the Respondent filed a brief in reply to the General Counsel's answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified and to adopt the recommended Order as modified.³

¹ The Respondent has moved to strike the General Counsel's brief in support of exceptions on the ground that it does not comply with Secs. 102.46(c)(1) and 102.46(j) of the Board's Rules and Regulations. Although the General Counsel's brief in support of exceptions does not conform in all particulars with Sec. 102.46, it is not so deficient as to warrant striking it here. Furthermore, the Respondent has not shown prejudice as a result of the deficiency. Accordingly, the Respondent's motion is denied.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The complaint alleged that at the April 9, 1998 employee meeting the Respondent unlawfully informed employees that the Respondent would start a committee to deal with safety concerns and working conditions. The judge dismissed this allegation without discussion. We find it unnecessary to pass on whether the Respondent's informing its employees that it would start such a committee constituted an unlawful promise of benefit because, as noted at fn. 3 below, we have found that the Respondent unlawfully promised benefits to employees on another occasion. Accordingly, such a finding here would be cumulative and would not affect the judge's recommended Order.

The judge, without discussion, found that on April 17, 1998, the Respondent, through one of its owners, Diana Moore, unlawfully threatened that the Respondent would close its facility if the Union won the election. Because the judge found that the Respondent made unlawful threats of closure on other occasions, we find it unnecessary to pass on whether Moore's April 17 statement also violated the Act. We shall modify the judge's conclusions of law accordingly.

³ We have modified the judge's recommended Order to provide for the production of electronic copies of the specified backup records if

DMI Distribution of Delaware, Ohio (DMI), the Respondent, warehouses bottles and delivers them to customers, primarily Anheuser-Busch, on an as needed basis. The Respondent has two warehouses, the main warehouse in Delaware, Ohio, and a smaller one in Columbus, Ohio. Neither facility is unionized. Duaine Moore and his wife, Diana Moore, are the owners of DMI and Dennis Tom is its vice president. Gary Commins and Roger Stewart are statutory supervisors.

On March 25, 1998,⁴ the Union held a meeting for the Respondent's employees at the Halfway House, a restaurant/gas station midway between Delaware and Columbus. Nine of the Respondent's employees attended the meeting, including alleged discriminatees Clarence Coleman and Carl Williamson. Soon after the meeting started, Commins and Stewart entered the Halfway House and sat at the counter where they ordered drinks. From the counter, they could see the employees who were attending the meeting. Shortly before the meeting ended, Commins and Stewart left the Halfway House and returned to the Respondent's facility.⁵ Thereafter, the Respondent took certain actions which the General Counsel alleges violated Section 8(a)(1) and (3) of the Act in an attempt "to nip in the bud" its employees' organizing activities before the election scheduled for June 4.⁶

The judge found that the Respondent committed certain of the alleged 8(a)(1) violations and further found that it violated Section 8(a)(3) by unlawfully discharging employee Carl Williamson on April 27. We adopt the judge's findings of these violations.⁷ The judge further found that the Respondent violated Section 8(a)(1) through Duaine Moore's statements to drivers at a December 7 meeting that they could become owner-

they are stored in electronic form. See *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1135 fn. 3 (1999).

Since, as explained at sec. 1 below, we are reversing the judge's finding that the Respondent unlawfully promised employees benefits and unlawfully encouraged them to become owner-operators at a December 7, 1998 meeting, we shall modify the judge's conclusions of law accordingly. However, because we adopt the judge's finding that the Respondent unlawfully promised employees benefits on another occasion, it is not necessary to modify the judge's recommended Order in this regard.

⁴ All dates are in 1998 unless otherwise stated.

⁵ We agree with the judge, for the reasons stated by him, that Commins' and Stewart's appearance at the Halfway House did not constitute an unlawful surveillance of union activities.

⁶ The election was canceled in early June and was not rescheduled.

⁷ For the reasons set out at sec. 2 below, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by giving bonuses to employees Chester Bennett and Ken Brown on May 30. In adopting the judge's finding that the Respondent unlawfully discharged Williamson on April 27, we rely also on the reasons set out at sec. 3 below.

operators. For the reasons set out in section 1 below, we reverse the judge's finding of this violation.

1. The judge found that in a December 7 meeting with the Respondent's drivers Duaine Moore promised a brand new tractor to any driver who wanted to become an owner-operator. The judge found that Moore made the statement "with the obvious intention of removing these drivers from any future bargaining unit" and that Moore's promise "was a clear tactic to undermine further the Union's efforts at his facility." (See the judge's decision at sec. III,I.) Finding further that Moore's promise of new tractors lacked a business justification, the judge found that the Respondent violated Section 8(a)(1) because he found, in effect, that Moore's promise of new tractors was a subterfuge to remove drivers from the bargaining unit and thus weaken it. The Respondent excepts to the judge's finding of this violation and asserts, *inter alia*, that there was a business justification for Moore's promise of new tractors for the drivers.

As an initial matter, we observe that the December 7 meeting was called at the request of the drivers to address certain concerns and that the meeting occurred over 6 months after the Union's organizing campaign. While, as the judge pointed out, the unfair labor practice charges were pending at the time of the December 7 meeting, there is no evidence that the union campaign was ongoing or that the meeting was called to address any possible organizing efforts. Further, as to the topic of the new tractors, the transcript of the December 7 meeting (GC Exh. 13) reveals that it was an employee who brought up the topic at the meeting and that Duaine Moore's statement that he would "set [the drivers] up as owner/operators and pay [them] so much a load" (GC Exh. 13 at p. 4) was made after Moore explained to the drivers that the Respondent was losing money because it had contracted to carry loads at a cost per load that was too low to cover expenses. In this context, we find that Moore's statement was justified by business considerations, *i.e.*, as a way to cut costs and to make a profit, and not as a subterfuge to weaken the Union's bargaining power by removing drivers from the unit. Finally, we note that the Union was not mentioned at the meeting and that no management official made any statement that directly raised the issue of the Union's organizing efforts at the Respondent's facility.⁸ In these circumstances, we

find that the Respondent had a business justification for raising the issue of the drivers becoming owner-operators of their own tractors with the Respondent's help and that the drivers would reasonably have understood this. Accordingly, we reverse the judge's finding of this violation.

2. Diana Moore gave drivers Chester Bennett and Ken Brown each \$100 in cash for work they performed on Saturday, May 30, 5 days before the scheduled election. Brown testified that although it was his weekend off he and Bennett had been called into work. Both Brown and Bennett testified that they were aware that the election was scheduled for June 4. Bennett had received such a bonus once or twice before, but Brown had not. Diana Moore testified that the Respondent's 11-year policy was to pay bonuses for extra work. Although the judge found that the Respondent had an established policy of paying bonuses to drivers, he found that the cash payments here were "inherently coercive" because they were paid only 5 days before the scheduled election and that Diana Moore "did not adequately explain" why she gave the bonuses only 5 days before the election. (See the judge's decision at sec. III,G.) We agree with the judge that the Respondent violated Section 8(a)(1) by giving the cash bonuses, but only for the following reasons.

As the Board explained in *United Airlines Services Corp.*, 290 NLRB 954, 954 (1988):

It is well established that the mere grant of benefits during the critical period is not, *per se*, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin*, [284 NLRB 98, 98 (1987)], quoting *Reds Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable,⁹ the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the

⁸ At one point in the meeting, however, Diana Moore stated that the Respondent had spent \$49,000 on attorney's fees and that it would "have to spend another hundred-thousand." (GC Exh. 13 at p. 7.) The clear implication of Moore's remarks were that the Respondent had spent the attorney's fees in opposing the union organizing efforts of its employees. However, this does not change the fact that Duaine Moore made his promise of new tractors within the context of explaining that

the Respondent was not making enough under the contract to make a profit.

⁹ The Board uses this same test in unfair labor practice cases. See *Perdue Farms*, 323 NLRB 345, 352 (1997), *enfd.* in relevant part 144 F.3d 830 (D.C. Cir. 1998). See also *B & D Plastics*, 302 NLRB 245 (1991), and *Speco Corp.*, 298 NLRB 439, 441-443 (1990).

timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972).

Since Diana Moore gave Bennett and Brown the \$100 bonus only a few days before the election, there is an inference that the grant of benefit was unlawful. The Respondent can rebut that inference by showing that there was a legitimate business reason for the timing of the bonus. Here, the Respondent contends that Diana Moore had an established practice over 11 years of granting such bonuses to DMI employees when they worked extra hours. The issue here is whether the Respondent has established that there was such a past practice of giving cash bonuses at its DMI Delaware operation which would support the Respondent's contention that Diana Moore gave the bonus to reward extra work and not to influence the employees' votes in the upcoming election. For the following reasons, we find that the Respondent has failed to carry its burden.

Although the judge found that the Moores had an established practice of giving employees bonuses by cash or check for extra work, he failed to consider whether this practice, which was an established past practice at the Moore's other corporations,¹⁰ was also a past practice of the Respondent. For while Diana Moore testified that the practice had been in effect for 11 years, she further testified that the Respondent had only been in operation 2 years, and that she had given out cash bonuses only "a couple" of times before at the Respondent's Delaware facility. (Tr. 501.) Given this testimony, as well as the facts that Bennett had received such a bonus only two or three times before and that Brown had never received such a bonus, we find that the Respondent did not have an established past practice of giving cash bonuses for extra work because "there is no evidence that such events occurred on a continuing or regular basis."¹¹ Given that Diana Moore gave the cash bonuses only a few days before the election, and that Bennett and Brown were aware that the election was scheduled for June 4, we find that these employees would reasonably have understood that Diana Moore gave them the cash bonuses to influence their votes in the election. It is on this basis that we adopt the judge's finding that the granting of the cash bonus benefit violated Section 8(a)(1).

3. The Respondent discharged Williamson on April 27 for allegedly violating company policy by failing to punch out when he left the Respondent's premises during

worktime on April 24. As explained by the judge, the Respondent's policy was to give its employees an unpaid 30 minutes for lunch. Employees who left the Respondent's facility at lunch on personal business were required to punch out, but employees who left work on company business did not have to punch out. Having found that under the applicable *Wright Line* analysis¹² the General Counsel had established a prima facie case that Williamson's discharge was unlawful,¹³ the judge further found that the Respondent's alleged reason for discharging Williamson, i.e., his failure to punch out on April 24, was without merit. In reaching this conclusion, the judge credited Williamson's testimony to the effect that on the morning of April 24 Tom had requested that he mow the grass at the Respondent's facility and that Williamson had left the facility to get gas for the Respondent's mowers.

In finding that Williamson was on official business when he left the Respondent's facility, the judge considered and rejected the Respondent's argument in rebuttal that another employee, and not Williamson, had left the Respondent's facility to get gas on April 24. In support of this argument, the Respondent introduced documentary evidence at the hearing (R Exh. 13), a receipt for \$10 with the name "Gary" on it, which the Respondent contends establishes that employee Gary Caldwell got gas on April 24, and not Williamson. In finding this argument without merit, the judge found that the issue of whether someone else had purchased gas for the Respondent on April 24 was a "red herring" because it did not establish that Williamson did not get gas on that date. We agree.

¹² 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As explained in *Regal Recycling, Inc.*, 329 NLRB 355 (1999) (footnotes omitted):

Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated anti-union animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

¹³ The judge found that the Respondent's numerous violations of Sec. 8(a)(1) beginning in late March evidenced the Respondent's union animus. He further found it "more likely than not" that Tom knew that Williamson was prounion because Williamson wore a union button to work and because Stewart and Commins had seen Williamson at the March 25 union meeting at the Halfway House and they had reported back to Tom about the meeting. Further, although not mentioned by the judge, we note that Tom testified that he decided to discharge Williamson on the evening of April 24, the same day that the Union filed its election petition with the Board.

¹⁰ Including the Respondent, DMI Distribution of Delaware, Ohio, Inc., the Moores owned four corporations which included approximately a dozen operations in three states, Indiana, Ohio, and Georgia. None of these operations was unionized.

¹¹ See *B & D Plastics*, *supra*, 302 NLRB at 245 fn. 2.

For the following reasons as well, we agree with the judge that the Respondent has failed to rebut the General Counsel's prima facie case that Williamson's discharge was unlawful.

As set out on the Respondent's "personnel transaction" form, Williamson was "terminated due to violation of company policy—left work to go to doctor on 4-24-98—did not punch out[.]" (R Exh. 8.) From this document, it appears that the policy Williamson violated, and the basis for his discharge, was failure to punch out. If this were true, then the issue of whether Williamson was on company business, i.e., whether he had gone to get gas for the Respondent's grass mowers, would be relevant as to whether his discharge was unlawful. However, the policy the Respondent accused Williamson of violating was not its punch-out policy, but rather its policy against stealing.¹⁴ Thus, to successfully rebut the General Counsel's prima facie case, the Respondent would have to show that Williamson was stealing time from the Company by either establishing that Williamson was not on his unpaid lunchbreak when he left the Respondent's facility or, if he were on his lunchbreak, that he was gone on personal business for more than the half hour allotted for lunch. This the Respondent failed to do.

Initially, we note that Williamson, whom the judge found to be an "especially credible witness," testified that he was on his lunchbreak when he left the Respondent's facility on April 24 and that he was gone less than a half hour. In response, the Respondent called Tom to testify in defense of its position that Williamson had stolen time from the Company. Tom, however, had no first-hand knowledge of when Williamson left the facility, when he returned, or if he was on his lunchbreak when he left. When asked about these issues, Tom repeatedly referred to what Don Bentley, a maintenance employee at that time, had told him. Thus, Tom testified on the first day of the hearing that he called Bentley between 1 and 1:30 p.m. on April 24, and that "[t]he indication from Mr. Bentley was that [Williamson] had been gone for quite a long while[.]" (Tr. 80-81.) Subsequently, however, on the fourth day of the hearing, when asked how long Williamson was gone on April 24, Tom responded: "I couldn't tell you how much. I know for a fact that when I talked to Mr. Bentley it was at 12:00, a little after 12:00, and—and Mr. Bentley had stated he [sic] was an

hour then." (Tr. 749.) Further, when asked to explain how he knew that Williamson was not on his lunchbreak when he left the facility, Tom responded that he "had talked to Mr. Bentley down in maintenance. And he had stated that." (Tr. 657.) At that point, Tom's response was interrupted by an objection, which was sustained. The question was never answered. Given Tom's lack of first-hand knowledge of the events at issue, we are reluctant to credit his testimony over Williamson's in resolving these issues.

Finally, the judge found it "significant" that Bentley, who, as the judge pointed out, "allegedly knew the most about Williamson's disappearance that day," failed to testify on the Respondent's behalf. In the circumstances present here, we find Bentley's failure to testify was more than "significant." Bentley, who was still employed by the Respondent at the time of the hearing, was promoted to maintenance supervisor shortly after Former Maintenance Supervisor Clarence Coleman's April 16 departure and was listed as "maintenance manager" on the Respondent's January 6, 1998 organizational chart. (U Exh. 1.) Given this context, we draw an adverse inference from the Respondent's failure to call Bentley and find that if he had been called as a witness his testimony would have adversely affected the Respondent's position.¹⁵ On this basis also, we find that the Respondent has failed to rebut the General Counsel's prima facie case that Williamson's discharge was unlawful.

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusions of Law 6 and 10 and renumber the following paragraphs accordingly.

2. Substitute the following paragraph for the judge's Conclusion of Law 12.

"10. The following allegations of the complaint are dismissed: paragraphs 6, 8(B), 8(C), 12(B), 12(C), 13, 14, 15, 16, 18, 19, 21(A), 21(E), 22(A), 22(B)(1), 22(B)(2), 22(B)(3), and 23(A)."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, DMI Distribution of Delaware, Ohio, Delaware, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

¹⁴ At the hearing, the Respondent's attorney asked Tom the following: "This Respondent's Exhibit 8 mentions a company policy. Was Mr. Williamson in violation of any company policy?" In response, Tom stated that Williamson was in violation of a company policy and that that policy was stealing. In explanation, Tom added that if Williamson was on personal business, "then he's stealing time from the company." (Tr. 647.)

¹⁵ See *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 2 (1987), enf'd. 863 F.2d 964 (D.C. Cir. 1988), where the Board explained that:

An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.

“(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

Thomas M. Randazzo, Esq., Cleveland, Ohio, for the General Counsel.

Jonathan C. Wentz, Esq., Columbus, Ohio, for the Union.

Victor A. Cavanaugh, Esq. (Elarbee, Thompson & Trapnell, LLP), Atlanta, Georgia, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. In an October 9, 1998 complaint, the General Counsel alleges that DMI Distribution of Delaware, Ohio, Inc. (DMI), illegally “nipped in the bud” a spring 1998 union organizing campaign among its employees, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. In an October 22, 1998 answer, DMI tersely denied the General Counsel’s various specific allegations.

This case was tried in Delaware, Ohio, on January 11, 12 and 13, and February 12, 1999¹ during which the General Counsel called 11 witnesses and the Respondent called seven witnesses. Finally, the General Counsel and the Respondent filed briefs on March 18, 1999.²

II. FINDINGS OF FACT

DMI warehouses bottles for delivery to local customers, primarily Anheuser—Busch’s brewery in Columbus, Ohio. DMI owns two warehouse facilities: the main one in Delaware, which is 18 miles north of the brewery; and a smaller one in Columbus (Tr. 557, 623, 679-80). The facility operates 24 hours a day, employing approximately 50 people, including nine drivers and 24 warehouse workers (Tr. 36, 53). Duaine and Diana Moore are each 50% owners of DMI, which they started in 1996. The Moores also own similar operations: three in Georgia and several in Indiana. None of these operations is unionized, as a union effort at organizing one Georgia plant failed in 1995 (Tr. 474, 495-96, 555, 580). The Moores live in Indiana and visit Delaware every two weeks or so (Tr. 35, 512, 555). The DMI operation in Delaware imports over \$50,000 in goods annually from outside Ohio (G.C. Ex. 1(q)). Dennis Tom is the vice president of DMI (Tr. 33).

¹ The final session was necessitated by the sudden departure of one witness, Dennis Tom, after his leadoff testimony for the General Counsel on January 11, upon learning of an out-of-town family emergency. So, we reconvened on February 12 to take the rest of his testimony as part of the Respondent’s direct case. Also, because of two different court reporters, using different pagination methods, pages 173 through 215 of the transcript do not exist.

² On December 18, 1998, the General Counsel filed for injunctive relief, pursuant to Section 10(j) of the Act, with the United States District Court in Columbus, Ohio. That matter is still pending.

Gordon Bond, an organizer for Teamsters Local Union No. 284, a/w International Brotherhood of Teamsters, AFL–CIO (the Union), set up a meeting of nine DMI employees on March 25, 1998 at the Halfway House, a restaurant/gas station midway between Delaware and Columbus (Tr. 98, 103, 280-81). Among those in attendance were drivers Kenneth Brown, Chester Bennett, and Prentice Hanners (Tr. 110, 222, 370), warehouse workers Nel Coleman and Frank Boring (Tr. 145, 246), maintenance man Carl Williamson (Tr. 345), and Coleman’s husband Clarence (Tr. 280–281). Bond met with this group after the first shift in a room in the Halfway House restaurant which was separated by an enclosed glass partition (Tr. 104). Twenty minutes after the meeting started, Supervisors Gary Commins and Roger Stewart arrived at the Halfway House, where they sat down at the counter for soda. While at the counter, Commins and Stewart looked occasionally at the meeting going on in the glass-enclosed room, which was adjacent to the counter. They left 20 minutes before the meeting ended (Tr. 99-101, 111-13, 223, 280-81, 416-8). Dispatcher Reba Smith noticed that there was a flurry of phone calls between Stewart, Commins, and the Moores at “approximately” 3:00 p.m. that day (Tr. 268-69).

Stewart told Tom and Mrs. Moore about the Halfway House meeting (Tr. 38, 476), whereupon Tom and Mrs. Moore both cautioned Clarence Coleman not to associate with the Union because “you are Company.” Coleman explained that he went to the meeting simply to listen (Tr. 283, 503-04). Stewart then told dispatcher Smith “not to associate with anyone involved in this Union stuff until it was over with other than job related.” Smith then asked Stewart if DMI was closing. Stewart replied that DMI would close if the Union came in. And Stewart told Smith that she could tell this to others. So, Smith called several employees, including Nel Coleman at home, and relayed Stewart’s message to her (Tr. 147, 268–70). The next day, Stewart told her not to make any more such phone calls (Tr. 271). Stewart, however, denied instructing anyone to inform employees that DMI would close (Tr. 813). Also that evening, employee Boring got a call at home from secretary Mary Ann Buchwalter (who left DMI in mid-1998) asking how he was going to vote on the Union matter. Buchwalter was worried about her job and testified that she made the call on her own. She never heard Stewart say anything about DMI closing (Tr. 597-99). But according to Boring, Buchwalter said that Stewart told her to make the call. Furthermore, Boring got another call that night from secretary April Barnett asking him the same question. Barnett told Boring that “they” told her to call (Tr. 247-50).

March 26, 1998, one day after the Halfway House meeting, was payday at DMI. Rachel Curren usually paid the employees (Tr. 148, 258). But this day Stewart and Commins did so (Tr. 259). Stewart told driver David Baughman that they “aren’t allowed to talk about certain events and that if these events were happening, that the doors of DMI would close down.” Thereafter, Stewart and Commins handed Baughman his paycheck (Tr. 108-09). That same day, Stewart and Commins gave Nel Coleman her paycheck. Commins told Coleman “I would really like for you to think about what you are doing” (Tr. 148). Stewart and Commins told Boring, before giving him his pay-

check, that “if the Union got in here we probably wouldn’t have a job”(Tr. 250). Commins admitted that he told Boring that he knew something was going on and to “stop and think” while giving the paycheck, but denied saying anything about Boring’s job (Tr. 420-21). And Stewart denied telling Boring or any other employee that his job was at stake if the Union came in (Tr. 812). Shortly after March 26, Commins received a list of “Dos and Don’ts” regarding management conduct during a union campaign (Tr. 419-22; R. Ex. 3). Mr. Moore was already familiar with the Dos and Don’ts from the days of the unsuccessful union organizing campaign in Georgia (Tr. 580).

On March 27, the Moores visited the Delaware plant to meet with the workers. This was the first ever such meeting (Tr. 260). Mr. Moore read a prepared speech in which he declared his opposition to the Union. Therein, Mr. Moore said that “unions have left a trail across the country of job loss, strikes, and unemployment for their members.” He also said that a signed union card “becomes your personal endorsement of the union and can be used in any way the union sees fit to use it” including “the legal right to turn those signed cards over to the company or to the federal government.” He also said that “[i]f we have problems here, then I want to correct those problems. Problems should be worked out face-to-face. We do not need any outsiders coming in here. . .” (R. Ex. 6; Tr. 566-67). According to Nel and Clarence Coleman, Boring and Hanners, one or both of the Moores *also* said the following. First, they talked about the bad aspects of a union, and that if the employees had any problems “all we had to do was go to the owner.” Second, Mr. Moore said he was too old to fight the Union and would close DMI before anyone told him how to run his business. Third, management would find out who signed any union authorization cards. Fourth, two other unionized companies in Delaware—Amana and Flexible—were both unionized and were now closed. Indeed, the Moores displayed big pictures of Amana, Flexible, and DMI, with the caption “closed” under Amana and Flexible, and “this could happen to DMI”(Tr. 149, 251-56, 285, 372-73, 408-09, 803-04). According to Mrs. Moore, she admitted saying that she could obtain access to the union authorization cards, that Amana and Flexible closed because they were unprofitable, and that the “union couldn’t save their jobs.” But she did not recall Mr. Moore saying anything about DMI closing. And she denied saying that DMI would close if the Union came in (Tr. 479-80, 486). Supervisor Barbara Chapman did not hear Mrs. Moore say that DMI would close (Tr. 525, 528). Mr. Moore also denied saying that DMI would close. He did admit, saying, however, that he was “getting too old for this” union stuff and that the Union could not guarantee job security for the employees. Also, Mr. Moore explained that he used the Amana/Flexible/DMI posters with the “closed” captions to illustrate the fact that a company could close if it became unprofitable, regardless of whether it was unionized (Tr. 566-68, 577-78, 585-86, 589, 594-95). Commins testified that Mr. Moore said that the union cards “could come back to the company.” But Commins did not recall whether Mr. Moore said anything about DMI closing (Tr. 423-24).

On April 8, Rachel Curren held a meeting to solicit complaints from the employees (Tr. 113). She asked Nel Coleman

to write down the complaints (Tr. 150-51, 261-62, 373; G.C. Ex. 6). Curren held such meetings once or twice a month (Tr. 134, 232, 265, 632). The next day, April 9, Tom met with the employees to discuss the list of complaints (Tr. 86-88, 115, 374). Tom said he would take care of certain complaints (Tr. 743). Mr. Moore told Carl Williamson that he would get a new lawn mower to address Williamson’s complaint. And Williamson got one (Tr. 116). According to Tom, he held similar meetings before April 9 (Tr. 741). Driver Bennett confirmed that Tom or Stewart would “sometimes” hold follow-up meetings (Tr. 232-33). According to driver Brown, however, Tom’s April 9 meeting was the only one he could recall (Tr. 138, 154-55).

Clarence Coleman oversaw the maintenance department. Specifically, there were two or three employees in that department who were responsible for the repair of DMI’s tractors and forklifts (Tr. 47, 286). Coleman started at DMI as a driver and assumed the job in maintenance in the spring of 1997. However, he still drove occasionally as needed (Tr. 43, 280). He had the power to hire and fire employees, but never exercised this power (Tr. 294). Upon taking this new job, Coleman received a pay raise from \$500 to \$600 a week (Tr. 291).

In the fall of 1997, a DMI official in Indiana criticized Coleman’s performance in the maintenance department (Tr. 531-32). So, Tom transferred Coleman to the transportation department—i.e., the drivers’ department (Tr. 43). There was no documentation of this transfer in DMI’s files, nor did it involve a change in pay for Coleman (Tr. 49). But there was a written job description which Coleman received, which Tom and Commins, Coleman’s immediate supervisor, reviewed with him (Tr. 75, 429, 462-63, 688). According to Tom, as transportation supervisor Coleman had disciplinary authority over DMI’s nine drivers. But Coleman never exercised this authority (Tr. 431, 694-96). Coleman said he only gave his opinion regarding employee performance (Tr. 294-95). According to Tom, one more job duty was to “lead by example” (Tr. 792). Coleman attended management meetings (Tr. 330). The written job description read as follows:

DMI DISTRIBUTION TRANSPORTATION SUPERVISOR

1. Responsible for checking completeness and correctness of all paperwork.
2. Checks daily to insure that all A/B requirements are met regarding the line schedule. Works with transportation manager regarding additional loads for Marzetti, Shasta and loads going to Indiana.
3. Checks daily that all trailer needs are met.
4. Helps drivers with hauling loads.
5. Coordinates with the transportation manager disciplinary action.
6. Helps insure all paperwork, including daily logs, are properly maintained and sent to corporate.
7. Checks with maintenance as to deadline trailers and checks the status of same.

R. Ex. 2). Despite the job change, Coleman continued to perform his old duties in the maintenance department because of the “backlog” therein, and to drive a truck as needed (Tr. 47-

49). A DMI diagram of jobs in the facility listed Don Bentley as the maintenance supervisor as of January 1998, and Coleman as the transportation supervisor as of January 1998 (U. Ex. 1). But another DMI document showed Bentley's promotion to "maintenance manager" on May 31, 1998 (R. Ex. 20). Finally, Tom and Commins characterized Coleman as the transportation supervisor or, more specifically, a "working supervisor" (Tr. 75, 424-25, 430).

Coleman denied that he ever supervised DMI's drivers. Moreover, he denied that he ever held the title of "transportation supervisor"³ or that he ever saw the corresponding written job description (Tr. 287, 308-09). Coleman also denied any responsibilities regarding the drivers' paperwork (Tr. 324). Likewise, driver Bennett never considered Coleman his supervisor. Indeed, he denied that Coleman ever directed his work as a driver. Rather, Bennett characterized Coleman as a "lead driver," to whom he would take any complaints he had (Tr. 228, 234). Another driver, Prentice Hanners, maintained that Coleman never assigned any work to him as a driver (Tr. 398). Still another driver, Kenneth Brown, also did not consider Coleman his boss. Rather, Brown viewed Coleman as a "lead driver" (Tr. 131, 140-42).

On Wednesday, April 8, Coleman told Tom and Commins that he no longer wanted to be a supervisor because of the job's pressure. According to Coleman, Commins said to finish out the week as maintenance supervisor and that as of Monday, April 13, Coleman could work fulltime as a driver again. But Commins added that Coleman should think about taking the transportation supervisor's job. Tom also asked him to think about the transportation supervisor's job (Tr. 288-90, 298). Tom considered the maintenance job more demanding than the transportation job (Tr. 787). According to Tom and Commins, the matter was resolved with Coleman giving up his maintenance supervisory duties, but retaining the transportation supervisory duties (Tr. 44-45, 96, 432-33, 699). But drivers Brown and Bennett testified that Commins said on April 9 that Coleman would be "back in the truck" come April 13 (Tr. 117, 224). However, Commins remembered Stewart telling the employees on April 9 that Coleman would be out of maintenance and "back as transportation supervisor" on April 13 (Tr. 434).

According to Coleman, when he arrived at DMI on April 13, he performed the job of a driver only (Tr. 295, 297). Indeed, Tom conceded that, during that week, Coleman's sole job duty was to drive a truck. But Coleman continued to wear his supervisor's uniform and to receive \$600 a week in pay (Tr. 722). Coleman had no other uniform to wear that week (Tr. 306). On Thursday, April 16, Tom noticed that Coleman delayed loading his truck because of standing water in the dock. So, Tom talked with Coleman about improving his management skills by setting a better example for the drivers. At this point, Coleman said he no longer wanted to be a supervisor. But Tom said that the only available job for Coleman was that of a transportation supervisor, not a driver. Coleman then walked away, not want-

ing the supervisor's job, and believing he was fired. Tom interpreted Coleman's action as voluntarily quitting work (Tr. 50-51, 68, 716-19). According to Coleman, Tom said to take the transportation supervisor's job or "hit the street." Coleman walked away, thinking he was fired (Tr. 298-99, 323). Commins was also present at this meeting and he testified that Tom suggested that Coleman seek employment elsewhere (Tr. 436-39). In a written statement explaining the events of this meeting, Commins said that "[w]e tried to explain to him that basically nothing was changing, he would keep driving but would be a driving supervisor and help me with minor daily activities regarding the drivers" (G.C. Ex. 5, p. 6). Coleman then told his wife Nel that Tom had just fired him because he wouldn't take the transportation supervisor job. Mrs. Coleman then quit her job (Tr. 155-57).

Coleman returned to DMI on April 17 to pick up his tool box when Mrs. Moore called him a dummy for giving up a good job (Tr. 300, 484). Mrs. Moore considered Coleman the maintenance and transportation supervisor (Tr. 481). Coleman returned home but called Mrs. Moore to deny that he had quit. Then, he and Nel decided to return to DMI to clarify things with Tom and Mrs. Moore (Tr. 158, 301). Mrs. Moore and Tom maintained that there was no driver job available for Coleman (Tr. 508, 800-01). After Mrs. Coleman suggested that "there's something more to this," Mrs. Moore reiterated her displeasure with Coleman's attendance at the union meeting in March (Tr. 217-19, 302). According to Mr. and Mrs. Coleman, Mrs. Moore also said that "we went through this bull shit down in Georgia, we're not going to go through this again up here, we'll just close the doors so fast that it will make your damn head spin" (Tr. 159, 303). Mrs. Moore denied saying that DMI would close if a union came in (Tr. 486). The meeting ended with Tom saying he would think things over. Later that night, however, Tom called Coleman at home to say that he (Coleman) had resigned (Tr. 160, 303). On April 19, DMI management named driver Andy Porter the transportation supervisor. Upon assuming the new job, Rich Dewees was hired from the outside to take Porter's old driver's job. Tom did not consider Coleman for the opening (Tr. 774-75).

Carl Williamson was a maintenance man at DMI. He had a good work record and had never been disciplined (G.C. Ex. 10; Tr. 352, 355). He attended the March union meeting at the Halfway House. He also wore a prounion button at work (Tr. 345, 354). On Friday, April 24, 1998, he went to the doctor during his lunch break. Before lunch, Tom asked him to mow the lawn or do some painting. Williamson said he had a doctor's appointment and might be late (Tr. 644). According to Williamson, he was gone for less than 30 minutes because before he got gas he was unable to see the doctor. Williamson actually had a scheduled appointment for later that day and he was trying to see the doctor early (Tr. 348, 350-51, 366-67). At around 1:00 p.m., Tom was looking for Williamson. Williamson's supervisor, Bentley, told him that Williamson had been gone for over an hour. Thereupon, Tom checked Williamson's timecard and discovered that he had not punched out (Tr. 80-81, 645, 796). DMI's policy gives employees an unpaid 30 minutes for lunch and requires that they punch out if they leave the premises. This policy excludes drivers (Tr. 84, 653). Wil-

³ In a September 1998 unemployment hearing, Coleman testified that he asked Commins to be relieved of his "transportation" supervisor's duties (Tr. 314-16).

Williamson was informed of this policy (Tr. 650). But Williamson never needed to punch out if he was on Company business such as getting parts off the premises (Tr. 346). Also according to Williamson, no employee had to punch out for lunch (Tr. 347). Tom did not see Williamson after Williamson's lunch break that day (Tr. 645, 756).

On Monday, April 27, Tom asked Williamson if he knew about the punch-out policy. Williamson said yes. Tom then fired Williamson for not punching out. Moreover, Tom believed that he had stolen at least 30 minutes of company time because Williamson had been gone at least one hour (R. Ex. 8; Tr. 645-47, 749-50). This was Williamson's first such offense and, indeed, the only employee ever so disciplined (Tr. 86, 760). Tom testified that he was unaware of Williamson's pronoun stance (Tr. 667). According to Tom, he had no discretion in firing Williamson because DMI rules stated that Williamson was "subject to immediate discharge" for stealing (R. Ex. 9; Tr. 761). As for getting gas, Tom testified that he told another employee that day, Gary Caldwell, to buy gas (Tr. 661-62). DMI records indicate that "Gary" bought \$10 worth of gas on April 24 at 1:41 p.m., and was reimbursed by Roger Stewart for the \$10 (R. Exs. 12-13; Tr. 810).

The Union filed a series of unfair labor practice charges beginning on April 27, and a representation election was set for June 4 (Tr. 102). On May 30, 1998, drivers Bennett and Brown worked on Saturday and each received an envelope with a \$100 bill inside from Commins. Bennett had received such a bonus once or twice before, but Brown had not. Both Brown and Bennett were aware of the pending June 4 election (Tr. 118-119, 224-26). According to Mrs. Moore, DMI's 11-year policy was to pay bonuses for extra work performed either by check or cash (Tr. 492, 499-500).

The Moores and Tom held meetings on May 28 and 29, and June 1 and 2 with the employees before the scheduled election (R. Exs. 5, 7). During the May 29 meeting Mr. Moore said:

If we didn't have the flexibility in our company we might as well close the doors. We like to cross-train people. . . [w]e like to be flexible.

If DMI should go union, I was told by both Anheuser-Busch and Ball Foster that we would be replaced. This is not hogwash, this is what they told me. They will not put up with somebody screwing up their supply of supplies. They won't put up with it. If this happened, if we went union and this happened and we closed we would be in the same position that Amana was in and Flex was in.

I don't know if that would happen or not. It's just what I was told.

(G.C. Ex. 11). In the June 1 employee meeting, Mrs. Moore stated:

I want to show you the benefits that you guys do have and you got these without paying one cent for a union. . . . You got your holidays, your paid vacations, medical and dental insurance. Paid sick days. The way we used to do it, we may go back to doing it that way. You don't use them, right before Christmas, you get it as a bonus which comes in handy at Christmas time.

We're not perfect, we're never going to be perfect with or without the union. I've heard a lot of complaints, comments, it will happen. And we try to do something about them. Right now you can come in to us and talk to us one on one. If a union gets in here you go through the union.

A-B and Ball Foster have told us that they could cut ties with us. They do not want to deal with anybody that is union.

That's what we've been told, they could replace us. I can't promise it would happen. I can't promise you anything. I can't promise you it won't happen. But don't they think the union could promise you that. But you better think of you co-workers a little bit and their families.

I want to show you one example, look at Flexible right next door one more time and then look at Amana. And then look at the last one it could be us and that's no bull-shit.

(G.C. Ex. 12). The election was never held.

In a December 7, 1998 meeting, several employees asked if DMI intended to replace each driver who quit with an owner/operator. Tom and Mr. Moore confirmed this policy (Tr. 120, 734-37). Then, Mr. Moore said:

if you guys want to become an owner/operator you can make more money. . . . If I didn't want to come into work, I wouldn't come to work. . . . You could make as much as you want to make. . . . I'll get you brand new tractors, okay. We'll set them up as owner/operators and you guys make the payments on them.

(G.C. Ex. 13).

III. ANALYSIS

The General Counsel alleges that DMI committed the following nine violations of Section 8(a)(1) and (3) of the Act during 1998: (a) surveillance by Supervisors Stewart and Commins of the March 25 union meeting; (b) interrogations and threats by Stewart and Commins on March 25 and 26; (c) threats by the Moores on March 27; (d) the April 8 solicitation of grievances from employees and April 9 promises to employees to remedy those grievances; (e) the April 16 discharge of Clarence Coleman; (f) the April 27 discharge of Carl Williamson; (g) the May 30 payment of \$100 bonuses to two drivers, in advance of the scheduled June 4 election; (h) the Moores' May 29 and June 1 threats to close the plant and a promise to give a benefit to employees; and (i) the December 7 effort by Mr. Moore to convert drivers into owner-operators.

A. Alleged Surveillance of the March 25 Union Meeting

Supervisors Stewart and Commins arrived 20 minutes after the initial union meeting at the Halfway House restaurant during the afternoon of March 25. They sat at the counter, ordered something to drink, occasionally looked at the goings-on in the glass-enclosed room adjacent to the counter, and left 20 minutes before the meeting ended. The General Counsel alleges that the two supervisors' appearance at the restaurant constituted illegal surveillance because there was a series of unusual

telephone calls between these two supervisors and the Moores at around 3:00 p.m. that day.

The evidence is simply too fuzzy to conclude that Stewart and Commins were tipped off about the union meeting before they went to the Halfway House. Specifically, while the meeting occurred after the first shift, dispatcher Reba Smith only testified about some unusual phone calls between the Moores and the two supervisors at "approximately" 3:00 p.m. But these calls could have occurred after their return from the Halfway House. Other than this tidbit, there is no evidence that the appearance at the Halfway House by Stewart and Commins was anything other than coincidental. The restaurant was located on the main highway between DMI's Delaware facility and the Anheuser-Busch brewery in Columbus. Moreover, Stewart and Commins' observation of the union meeting was unavoidable because it was impossible not to see the meeting from the adjacent restaurant counter where they sat to drink. Thus, the mere presence of Stewart and Commins in this public place was insufficient to constitute illegal surveillance of the union meeting. See *Advanced Business Forms Corp.*, 194 NLRB 341, 343 n. 4 (1971).

B. Interrogations and Threats by Stewart and Commins on March 25-26

Once Stewart and Commins found out about the union meeting, however, management reacted illegally in a number of ways. First, the evidence shows that Stewart commenced an effort to interrogate the employees and threaten them. Specifically, dispatcher Smith testified that Stewart told her that DMI would close if the Union came in, and that she could relay this message to the employees if she chose to. Smith did so in evening calls to several employees, including Nel Coleman. While Stewart denied Smith's allegation, the Presiding Judge credits Smith over Stewart. For one thing, the Respondent called Stewart as a witness at the very end of the trial, only after it was painfully obvious that numerous allegations were being made against Stewart. Even then, Stewart was called primarily to testify about an entirely ancillary matter. Moreover, even though hampered by a cold, Stewart did not testify in a convincing, forthright manner. On the other hand, Smith did. Further, there were other related allegations of misconduct by Stewart. Specifically, secretary Barnett testified that "they" told her to interrogate driver Boring on the evening of March 25 about his union sympathies. Also, Boring testified that secretary Buchwalter called him that same night with the same questions, at Stewart's instruction. In short, the preponderance of the evidence is that Stewart used his staff to violate Section 8(a)(1) immediately after the Halfway House meeting.

Stewart's misconduct continued the next day and was joined by Commins. Specifically, both of these supervisors directly threatened three employees on March 26 about participating in union activities and, for emphasis, did so while passing out paychecks. Moreover, DMI's usual practice was for Rachel Curren to distribute the paychecks. As for the threats, it is unrebutted that Stewart told driver Baughman that management was not allowed "to talk about certain events and that if these events were happening, that the doors of DMI would close down." It is likewise unrebutted that Commins told Nel Cole-

man, while giving her a paycheck, that "I would really like for you to think about what you are doing." Lastly, Commins asked driver Boring to "stop and think" while giving him the paycheck. Clearly, the aforementioned veiled threats against three DMI employees created the impression that their union activities were under surveillance and constituted threats against them, thus violating Section 8(a)(1). See *Elm Hill Meats*, 205 NLRB 285, 288-89 (1973); *Lincoln Supply Co., Inc.*, 198 NLRB 932, 935-36 (1972).

C. Threats by the Moores on March 27

The General Counsel alleges that the Moores violated Section 8(a)(1) in three basic respects when they came to Delaware on March 27 to meet with the employees. First, it is alleged that they threatened to close the plant if the Union came in. Second, Mr. Moore promised to take care of any employee problems in lieu of a union. And third, the Moores threatened the employees by stating that they could find out who signed union cards. The Respondent counters that the Moores simply read a prepared text to the employees and said nothing more.

In the Presiding Judge's view, there was nothing wrong with Mr. Moore's written statement that the employees should talk with him instead of a union, and that the signed union cards might become public. But the Respondent is wrong that the written statement constituted the totality of his remarks. Indeed, four credible witnesses testified that Mr. Moore threatened to close the Delaware plant if it went union. While both Moores and one supervisor, Barbara Chapman, denied that anything was said about closing the Delaware plant, two of the General Counsel's witnesses who testified to Mr. Moore's threat—Boring and Hanners—are still DMI employees, thus giving added weight to their version of events. *Formed Tubes, Alabama*, 211 NLRB 509, 511 (1974). Moreover, it is undisputed that Mr. Moore emphasized his threat with pictures of two other local unionized plants which had closed. Thus, the preponderance of the evidence shows that Mr. Moore violated Section 8(a)(1) by explicitly threatening to close the Delaware plant in his speech to employees on March 27. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

D. The April 8 Solicitation of Grievances and April 9 Promises to Remedy Those Grievances

It is next alleged that Supervisor Curren's solicitation of grievances on April 8, and Tom's promises to remedy those grievances on April 9, were extraordinary steps taken by the Respondent to undermine the Union's nascent organizing campaign. But it is well-established that where an employer already has a policy of soliciting employee grievances, "the employer may continue the practice during the organizing drive, but may not significantly alter its past manner and method of solicitation." *Clare Hospital*, 273 NLRB 1755 (1985). Here, the evidence clearly shows that Curren had a practice of holding meetings with employees before April 8 to talk about their problems. Thus, the General Counsel is factually mistaken that these pre-April 8 meetings addressed only "safety" issues. As for follow-up meetings to address those grievances, Tom and driver Bennett both testified that management held such meetings before April 9. Moreover, Tom's "promises" on April 9

merely consisted of a statement that he would fix equipment problems and get one employee a new lawnmower. Compare *House of Raeford Farms*, 308 NLRB 568 (1992) (employer promised to improve employees' wages and benefits). Thus, the General Counsel has failed to prove, by a preponderance of the evidence, that the April 8 and 9 meetings were novel or that management's actions taken thereafter interfered with the employees' Section 8(a)(1) rights. See *EFCO Corporation*, 327 NLRB 372 (1998) (no violation where employer has existing policy of soliciting grievances).

E. The April 16 Discharge of Clarence Coleman

A threshold question concerns Coleman's supervisory status during the first half of April 1998 because, as the Respondent recognizes, supervisors and managerial employees are not entitled to the protections of the Act. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). As set forth in Section 2(11):

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

And the party seeking to prove supervisory status has the burden of proof. *Clark Machine Corp.*, 308 NLRB 555 (1992).

Upon a thorough review of the evidence, it is concluded that Coleman was never a supervisor at DMI. In the spring of 1997, he received the job of "maintenance supervisor" in a department of two or three employees. But mere labels do not make a true supervisor. See *Billows Electric Supply*, 311 NLRB 878 (1993). In this position, Coleman never actually hired or fired anyone; a key indicia of supervisory status. *Darbar Indian Restaurant*, 288 NLRB 545, 551 (1988). Nor has the Respondent proven that he possessed any of the other primary indicia set forth in Section 2(11). In addition, Coleman continued to drive a truck as needed. To be sure, he got a raise from \$500 to \$600 a week. But this secondary factor, including the official label bestowed by DMI, is insufficient to confer supervisory status upon Coleman. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994).

Likewise, Coleman was never a statutory supervisor as of the fall of 1997, when he transferred to the position of "transportation supervisor." Indeed, Coleman's more accurate job title was "lead driver." The evidence clearly shows that the DMI drivers never considered Coleman to be their boss. Moreover, even Tom and Commins conceded that Coleman was a "working supervisor." Although Coleman continued to earn \$600 a week, attended management meetings, and wore a uniform which said supervisor, the Respondent has failed to establish that Coleman possessed any of the primary supervisory indicia of Section 2(11). Therefore, it is concluded that Coleman was a maintenance department employee from the spring of 1997 until the fall of 1997, a lead driver/maintenance employee from

the fall of 1997 until April 10, 1998, and a fulltime driver from April 13 to 16, 1998.

3Now turning to circumstances of Coleman's departure from DMI on April 16, the Presiding Judge concludes that Coleman quit his job then. The plain fact is that Coleman was the lead driver since late 1997 but that he no longer wanted to be lead driver after April 1998. To that end, he told this to Tom and Commins on April 8. Thereafter, they accommodated Coleman with an interim assignment of driving fulltime, but it is unrebutted that DMI had no fulltime driver's job for Coleman before April 16. When faced with sole choice of continuing as the lead driver, Coleman walked away from DMI on April 16, notwithstanding his protests to the contrary that he did not quit. As for the General Counsel's theory that DMI fired employee Coleman for his attendance at the Halfway House meeting, the Respondent has the better retort. Specifically, management could have fired "maintenance supervisor" Coleman shortly after his attendance at the March 25 union meeting. Alternatively, management did not need to offer Coleman several chances to retain his lead driver position from April 16 to 17 if it was bent on getting rid of him. In sum, stripping away all the labels attached to his job position(s), Coleman was responsible for initiating the chain of events leading to his April 16 departure from DMI. So, the General Counsel has failed to prove that DMI terminated Coleman for his protected concerted activity.

The General Counsel alleges that Williamson was fired because he was prounion; the Respondent counters that it fired Williamson because he violated company policy by failing to clock out during his lunch break when he left DMI's premises. In either event, the analysis of this issue is governed by the standards of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, to prove its Section 8(a)(1) and (3) allegations regarding the Respondent's termination of Carl Williamson, the General Counsel must establish, by a preponderance of the evidence, that his protected union activity was a motivating factor in the Respondent's decision to terminate him. If so established, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that its action was based on a lawful reason and would have occurred absent the protected activity.

3The Presiding Judge concludes that the General Counsel has met his *Wright Line* burden. Specifically, there is substantial evidence of the Respondent's union animus, demonstrated by its numerous violations of Section 8(a)(1) of the Act in late March 1998, following the start of union activity at the DMI plant. Further, Williamson was an open union supporter, albeit there is no specific evidence that Tom knew this. But Williamson wore a prounion button at work, and Supervisors Stewart and Commins noticed him at the Halfway House meeting on March 25 before reporting to Tom about the meeting. In sum, it is more likely than not that Tom knew about Williamson's prounion position.

So, the burden now shifts to DMI to prove that Williamson would have been fired for failing to clock out, notwithstanding his union activity. At the outset, it is undisputed that DMI had

a policy requiring employees to clock out if they left the premises, excluding drivers and others on official business. But Williamson was on official business during his lunch break on April 24 because Tom had just asked him to mow the lawn, and Williamson needed to buy gas. Williamson was an especially credible witness and the Presiding Judge believes his testimony that he purchased gas on his lunch break, notwithstanding the lack of evidence to document this purchase. As for the purchase of gas later that day by another employee, Gary Caldwell, that is a red herring: Caldwell's purchase of gas doesn't mean Williamson did not buy gas earlier in the day. Likewise, Williamson's quick stop at the doctor during his lunch break was irrelevant as to whether he needed to clock out. Further, the totality of the circumstances strongly suggests that Tom's decision to fire Williamson was based on more than a simple infraction of the clock-out rule. This supposed infraction was Williamson's first offense, he was a good employee, and DMI rules did not automatically warrant termination for such an offense. As for the Respondent's corollary claim that Williamson had disappeared for over an hour on April 24, during his 30-minute lunch break, it is significant that the person who allegedly knew the most about Williamson's disappearance that day—Don Bentley—did not testify. In short, DMI has failed to rebut the General Counsel's showing that Williamson was terminated for his union activity. Accordingly, DMI will be required to offer Williamson reinstatement to his former job, with appropriate backpay.

G. The May 30 Bonuses

Mrs. Moore paid two DMI drivers, Chester Bennett and Ken Brown, \$100 in cash apiece for work they performed on Saturday, May 30. The election was scheduled for June 4. Thus, the General Counsel alleges that these payments were intended to dissuade the two drivers from voting for the Union. It is true that DMI had an established practice of paying bonuses to drivers, which Mrs. Moore described generally. Indeed, driver Bennett admitted receiving such a bonus once or twice before May 30. But these cash payments to two employees just five days before the scheduled election were inherently coercive. Moreover, Mrs. Moore did not adequately explain why these bonuses were paid during the critical preelection period. *B & D Plastics*, 302 NLRB 245 (1991). Thus, the May 30 payments violated Section 8(a)(1).

H. Various 8(a)(1) Violations Regarding the May 29 and June 1 Meetings

Just days before the scheduled June 4 election, the Moores held meetings with the employees. The General Counsel alleges that on May 29, Mr. Moore threatened to close the Delaware facility with two antiunion references. First, Moore intimated that the Union would impinge upon DMI's "flexibility," necessitating plant closure. Second, Moore said that his two main customers, Anheuser-Busch and Ball Foster, told him that DMI would be an ex-customer if the Union won. The Respondent maintains that both of these statements were truthful and thus protected free speech under Section 8(c) of the Act. In the Presiding Judge's view, however, both statements crossed the line. As discussed in paragraph 26, *supra*, Mr. Moore clearly

threatened to close the plant in an employee meeting on March 1. The two statements on May 29 reiterated that earlier threat with a poorly camouflaged reference to "flexibility" and entirely unsupported claim that Anheuser-Busch and Ball Foster threatened to sever ties with DMI. See *NLRB v. Gissel Packing Co.*, *supra*.

Turning to the employee meeting of June 1, Mrs. Moore repeated the unsubstantiated threat that Anheuser-Busch and Ball Foster would "cut ties" with DMI if it went union. Earlier, on April 17, she threatened to close the plant in a private meeting with the Colemans. Also on June 1, she promised to alter the company's sick leave policy to allow the employees to convert unused sick leave before Christmas into bonus pay. The Respondent has failed to defend this allegation and the General Counsel is correct: Mrs. Moore's latest threat and promise violated Section 8(a)(1).

I. The December 7, 1998 Employee Meeting

Finally, the General Counsel alleges that in a December 7, 1998 meeting with DMI's drivers, Mr. Moore encouraged them to become owner/operators, with the obvious intention of removing these drivers from any future bargaining unit. To this end, Mr. Moore promised any driver that wanted to become an owner/operator a "brand new tractor." The Respondent contends that these remarks were irrelevant because the scheduled June election was over six months in the past and there was no evidence of any lingering union animus as of December 1998. The Respondent ignores the fact, however, that unfair labor practice charges were pending against DMI at the time, with the instant trial just a few weeks away. Thus, while hostilities between the Union and DMI were dormant as of late 1998, the underlying issues encompassed by the General Counsel's complaint were hardly resolved. Further, Moore's promise was a clear tactic to undermine further the Union's efforts at his facility. Indeed, DMI failed to explain the business justification, if any, of this new policy. Thus, it is concluded that Moore's December 7 promise also violated Section 8(a)(1). See *Reeves—Wiedeman Co.*, 203 NLRB 850, 856 (1973) (an employer's subterfuge to remove employee from bargaining unit violates the Act).

J. Summary

DMI's numerous violations of Section 8(a)(1) of the Act, outlined *supra*, occurred immediately after union organizing activity commenced at the Delaware plant in March 1998, continued up to the aborted election in June 1998, and lingered right on through December 1998, just weeks before the trial in this case. Accordingly, DMI will be ordered to cease and desist this illegal conduct, and to post appropriate remedial notices. Further, DMI will be ordered to offer employee Carl Williamson reinstatement to his old job for its illegal termination of him in April 1998.

CONCLUSIONS OF LAW

1. The Respondent, DMI Distribution of Delaware, Ohio, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Teamsters Local Union No. 284, a/w International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Pursuant to paragraphs 7, 9 and 24 of the General Counsel's complaint, the Respondent violated Section 8(a)(1) of the Act on March 25, 1998 when Supervisor Roger Stewart directed subordinates to interrogate employees about their union sympathies and to threaten employees with closing the facility.

Pursuant to paragraphs 8(A), 10, 11 and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on March 26, 1998 when Supervisors Roger Stewart and Gary Commins, while distributing employee paychecks, created the impression that employees' union activities were under surveillance and threatened employees if they supported the Union.

5. Pursuant to paragraphs 12(A) and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on March 27, 1998 when Duaine Moore threatened the employees with plant closure if they selected the Union as their collective-bargaining representative.

6. Pursuant to paragraphs 16(C) and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on April 17, 1998 when Diana Moore threatened to close the Delaware facility if the employees selected the Union as their collective-bargaining representative.

7. Pursuant to paragraphs 17 and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on May 29, 1998 when Duaine Moore threatened to close the Delaware facility if the employees selected the Union as their collective-bargaining representative.

8. Pursuant to paragraphs 20 and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on May 30, 1998, by paying the drivers cash bonuses before the scheduled election.

9. Pursuant to paragraphs 21(B), (C), (D) and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on June 1, 1998 when Diana Moore promised to grant employees a benefit if they refrained from engaging in union activities, and threatened closure of the Delaware facility if the employees selected the Union as their collective-bargaining representative.

10. Pursuant to paragraphs 22(B)(2), (3), and 24 of the complaint, the Respondent violated Section 8(a)(1) of the Act on December 7, 1998 when Duaine Moore promised to confer benefits on employees, and encouraged employees to become owner-operators in order to discourage employees from exercising rights protected by Section 7 of the Act.

11. Pursuant to paragraphs 23(B), (C) and 25 of the complaint, the Respondent violated Section 8(a)(1) and (3) of the Act on April 27, 1998 by discharging employee Carl Williamson.

12. The General Counsel has failed to prove his allegations at paragraphs 6, 8(B), 8(C), 12(B), 12(C), 13, 14, 15, 16(A), 16(B), 16(D), 16(E), 18, 19, 21(A), 21(E), 22(A), 22(B)(1), and 23(A) of the complaint.⁴

⁴ At trial the General Counsel withdrew original paragraphs 22(B), 22(C), 22(D), and 25 of his complaint. But he added new allegations, and renumbered them as paragraph 22(B)(1), (2) and (3)(G.C. Ex. 3).

13. The unfair labor practices of the Respondent, described in paragraphs 3 through 11, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, IT IS ORDERED that the Respondent, DMI Distribution of Delaware, Ohio, Inc., its officers, agents, successors, and assigns, shall:⁵

1. Cease and desist from:

(a) Interrogating employees about their union sympathies.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Threatening employees in any manner, including with plant closure, if they support the Union.

(d) Promising to grant, or granting, employees benefits if they refrain from engaging in union activity.

(e) Discharging any other employees for engaging in union activity.

(f) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following action:

(a) Within 14 days of the date of this Order, offer Carl Williamson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Carl Williamson whole for any loss of pay and benefits he may have suffered by reason of his unlawful termination, to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within three days thereafter notify Carl Williamson in writing that it has done so and that it will not use the discharge against him, in any way.

(e) Within 14 days after service by the Region, post at its facilities in Delaware, Ohio and all other places where notices customarily are posted copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the

Also, original paragraph 26 was renumbered as paragraph 25, and original paragraph 27 was renumbered as paragraph 26.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge's

Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union sympathies.

WE WILL NOT create the impression that employees' protected concerted activities are under surveillance.

We will not threaten employees in any manner, including with plant closure, if they engage in these protected concerted activities.

WE WILL NOT promise to grant employees benefits if they refrain from engaging in these protected, concerted activities, and WE WILL NOT grant any such benefits.

WE WILL NOT discharge our employees for engaging in these protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer Carl Williamson full reinstatement to his former job or, if that former job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Carl Williamson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this order, remove from our files any reference to the unlawful discharge and within 3 days thereafter notify Carl Williamson in writing that this has been done and that the discharge will not be used against him in any way.

DMI DISTRIBUTION OF DELAWARE, OHIO, INC.